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IN THE

Supreme Court of the United States

OCTOBER TERM 1994

TOMMY ROSS ANDERSON,
SARAH JANE ANDERSON,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the forfeiture of property under Title 21 of the United States Code creates a double jeopardy bar to criminal prosecution based on the same conduct giving rise to the forfeiture.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
(i) Procedural History	2
(ii) Statement of Facts	3
RESTATEMENT OF QUESTION PRESENTED	4
REASONS FOR GRANTING THE WRIT	4
I. The Double Jeopardy Clause, *Halper* and *Austin*	5
II. The Court of Appeals Opinion	9
a. The Court of Appeals erred in not accepting the conclusion of *Austin* that forfeitures will always constitute punishment.	9
b. The Court of Appeals erred in failing to distinguish between proceeds of illegal activity and proceeds traceable to illegal activity.	11
c. Even if the *Halper* analysis applies, the Court of Appeals has improperly applied it.	13
III. Contrary Authority From Other Courts	15
IV. Failure to Hold Evidentiary Hearing	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Application of Kingsley, 614 F.Supp. 219 (D.Mass.1985)	12
Austin v. United States, 509 U.S. __, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)	*passim*
Crist v. Bretz, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978)	5
Danny Fant v. State of Texas, __ S.W.2d __ (Tex. App. - Houston [14th Dist.], July 21, 1994, No. A14-94-00013, 1994 W.L. 377748)	15
Department of Revenue of Montana v. Kurth Ranch, __ U.S. __, No. 93-144 (June 6, 1994)	8,15
North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 656 (1969)	5
State of Louisiana v. 1979 Cadillac Deville and $24.00 U.S. Currency Seized From Frank L. Wilson, 632 So.2d 1221 (La.App. 2 Cir. 1994)	16
U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York, 954 F.2d 29 (2d Cir. 1992)	11,14
U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)	*passim*
U.S. v. McCaslin, 959 F.2d 786, 788 (9th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 382 (1992)	17
U.S. v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)	8

United States v. A Parcel of Land, Buildings, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Runson, New Jersey, __ U.S. __, 113 S.Ct. 1126, __ L.Ed.2d __ (1993) 7

United States v. Banco Lafetero Panama, 797 F.2d 1154 (2d Cir. 1986) 12

United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) 5

United States v. One 1987 Mercedes 560 SEL, 919 F.2d 327 (5th Cir. 1990) 12

United States of America v. Jerry Wayne Tilley, Susan Wells Tilley, Tommy Ross Anderson and Sarah Jane Anderson, 18 F.3d 295 (5th Cir. 1994) 2,A-1

Wood v. U.S., 863 F.2d 417, 42 (5th Cir. 1989) 11

Statutes

21 U.S.C. . . . . .

21 U.S.C. § 881(a)(4) and (a)(7) 6,7,11,18

21 U.S.C. § 881(a)(6) 7-12,18

28 U.S.C. § 1254(1) 2

Constitutional Provisions

United States Constitution, Amendment V 2,5,8

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PETITION FOR WRIT OF CERTIORARI

Petitioners, TOMMY ROSS ANDERSON and SARAH JANE ANDERSON, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 23, 1994 (rehearing denied May 11, 1994) affirming the District Court's denial of Petitioner's motion to dismiss on grounds of double jeopardy an indictment brought against Petitioners.

JERRY WAYNE TILLEY and SUSAN WELLS TILLEY are co-defendants in the pending indictment, were co-appellants in the Court of Appeals and are also petitioning this court of a writ of certiorari. Petitioners, TOMMY ROSS ANDERSON and SARAH JANE ANDERSON, hereby join in and adopt the entire petition for writ of certiorari filed by the Tilleys.

OPINIONS BELOW

The opinion of the United States Court of Appeals denying Petitioners' appeal is reported as follows:

> *United States of America v. Jerry Wayne Tilley, Susan Wells Tilley, Tommy Ross Anderson and Sarah Jane Anderson*, 18 F.3d 295 (5th Cir. 1994).

This opinion may be found in Appendix A of this petition. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is found at Appendix B.

The unreported opinion of the United States District Court for the Northern District of Texas denying Petitioners' motion to dismiss the charges against them based on double jeopardy is found at Appendix C.

JURISDICTION

The Court of Appeals affirmed the judgment of the District Court on March 23, 1994. Rehearing was denied on May 11, 1994.

This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....

STATEMENT OF THE CASE

(i) Procedural History

On July 25, 1991, the government filed a complaint for forfeiture and obtained an order for warrant of arrest of property against certain real and personal property belonging to Petitioners TOMMY ROSS ANDERSON and SARAH JANE ANDER-

SON. Petitioners subsequently filed a claim for seized property and an answer to the complaint. The government later amended its request for order for warrant of arrest and filed its first amended complaint for forfeiture. Petitioners filed an amended answer. On February 9, 1993 Petitioners and the government executed a stipulated forfeiture of certain of the properties and on February 9, 1993, the District Court entered an order forfeiting properties belonging to Petitioners to the government.

On October 8, 1992, Petitioners were indicted, along with co-defendants, JERRY WAYNE TILLEY and SUSAN WELLS TILLEY, in the District Court for various drug offenses. The indictment was based on the same acts that gave rise to the forfeiture of their property.

On April 9, 1993 Petitioners filed defendants' plea of double jeopardy. On April 16, 1993 the government responded to this plea. On April 27, 1993 the District Court entered a Memorandum Order denying Petitioners plea of double jeopardy and refused to dismiss the indictment. On the same date, the District Court found the appeal to be a non-frivolous appeal and stayed the proceedings pending the outcome of an appeal to the United States Court of Appeals. Appeal was pursued to the Court of Appeals and on March 23, 1994 a panel of the United States Court of Appeals affirmed the opinion of the District Court. On May 11, 1994, the Court of Appeals denied Petitioners' petition for rehearing and suggestion for rehearing en banc.

(ii) Statements of Facts

Petitioners are accused by indictment of various charges involving violation of the narcotics laws. The indictment also charges co-defendants, JERRY WAYNE TILLEY and SUSAN WELLS TILLEY with similar violations. Prior to being indicted on this case, the government moved to forfeit various real and personal property belonging to Petitioners on the basis that this property was subject to forfeiture because it was utilized in drug trafficking, was proceeds from the sale of illegal drugs or

was traceable to such proceeds. The basis for the forfeiture are the same facts which form the basis of the indictment in this case.

The forfeiture suit has been settled and a final judgment entered. The trial of the indictment in this case was stayed pending the resolution of this appeal.

RESTATEMENT OF QUESTION PRESENTED

Whether the forfeiture of property under Title 21 of the United States Code creates a double jeopardy bar to prosecution based on the same conduct giving rise to the forfeiture.

REASONS FOR GRANTING THE WRIT

The Court of Appeals opinion in this case is in conflict with the following two opinions from this court:

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)

Austin v. United States, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)

Additionally, the question of whether forfeiture of property under Title 21 of the United States Code constitutes a double jeopardy bar to criminal prosecution based on the same conduct giving rise to the forfeiture has not been directly addressed by the Supreme Court. Since the Supreme Court issued its decision in *Halper*, state and federal courts from around the country have actively grappled with this issue. The Court strongly indicated in *Austin* what the proper outcome would be. However, even in the aftermath of *Austin*, various courts around the country have come to differing conclusions. The question raised in this petition is an important question of federal law which has not been, but should be, settled by the Supreme Court.

I. The Double Jeopardy Clause, *Halper* and *Austin*

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." United States Constitution, Amendment V. This clause of the Fifth Amendment protects against three abuses: 1. a second prosecution for the same offense after acquittal; 2. a second prosecution for the same offense after conviction; and 3. multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 656 (1969). The Double Jeopardy Clause is also intended to prevent the government from subjecting a defendant to undue expense, embarrassment, ordeal and anxiety. *Crist v. Bretz*, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *United States v. Dinitz*, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

The defendant in *Halper* was convicted in a criminal prosecution of submitting false claims to the government, sentenced to prison, and fined. The government then brought suit against the defendant seeking up to $130,000.00 in civil penalties for the same conduct. The Court barred the government on double jeopardy grounds from collecting any penalties disproportionate to its actual cost arising from *Halper's* fraud. 109 S.Ct. at 1903-1904. The *Halper* decision was based on the fact that "civil proceedings may advance punitive as well as remedial goals"and that the "notion of punishment cuts across the division between the civil and the criminal law." *Id.* at 1901. The *Halper* court recognized that "a civil sanction, *in application*, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 1899. In other words, a "civil as well as criminal sanction constitutes punishment when the sanction *as applied in the individual case* serves the goals of punishment." *Id.* at 1901-1902. If the compensation extracted from a defendant in a civil proceeding greatly surpasses the remedial justice to which the government

is entitled, then that compensation becomes clear injustice if the "supposedly remedial sanction far exceeds the government's damages and actual costs." *Id.* at 1901.

Austin somewhat altered the *Halper* analysis as it applied to forfeiture cases. Although *Austin* dealt specifically with a claimed Eighth Amendment excessive fine violation, the court's discussion of the meaning of "punishment" and "remedial" gave further guidance as to when the double jeopardy clause may prohibit pursuing criminal prosecutions following the forfeiture of property.

In *Austin* the Defendant plead guilty under South Dakota law to possession of cocaine with intent to distribute. The United States then instituted forfeiture proceedings in federal court under Title 21 of the United States Code against Austin's mobile home and auto body shop where the drug transaction occurred. *Austin*, 113 S.Ct. at 2803. Austin claimed that the excessive fines clause of the Eighth Amendment applied to forfeitures. The Supreme Court agreed. In reaching this conclusion; the Court explored the history of forfeitures to determine if a forfeiture under Title 21 would be considered punishment.

The court in *Austin* concluded that forfeitures generally are punishment, *Id.* at 2810, and that in particular forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) are punishment, *Id.* at 2812. *Austin*'s conclusion that forfeitures are always considered punishment for constitutional purposes altered the *Halper* analysis in the forfeiture context. Since under *Austin* forfeitures are always considered punishment, whether they are excessive is not a necessary element to be established. While the fixed fine context of *Halper* required a showing of excessiveness in order to establish that the fine was punishment for constitutional purposes, the same is not true of forfeitures. Under *Austin*, forfeitures are always punishment without regard to whether the forfeiture is excessive or exceeds the reasonable costs and

expenses to the government in determining and prosecuting the offense.

The analysis in *Austin* applies directly to the question of whether the forfeiture of Petitioners' property will constitute a double jeopardy bar to their prosecution on the criminal indictment. *Halper* made clear that it violates the Fifth Amendment to prosecute both the criminal case and separately seek some other sanctions so long as the other sanction can be characterized as punishment. Under *Austin*, the forfeiture in the case at bar is clearly punishment.

In *Austin*, the Court explained that forfeitures have historically been considered as punishment. This common law principle has been carried forward into modern forfeiture statutes as evidenced by the legislative history and purpose of Title 21 forfeitures. As further evidence of the intent of the forfeiture statutes to punish criminal conduct, the court discussed the innocent owner defense under Title 21, stating:

> If forfeiture had been understood not to punish the owner there would have been no reason to reserve the case of a truly innocent owner. Indeed it is only on the assumption that forfeiture serves in part to punish that the court's past reservations of that question makes sense. *Id.* at 2809.[1]

21 U.S.C. § 881(a)(4) and (a)(7), the statutes addressed directly in *Austin* have a specific innocent owner defense. Likewise, 21 U.S.C. § 881(a)(6), the specific statute at issue in this case, has an innocent owner defense.[2]

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[1] The innocent owner defense under 21 U.S.C. § 881(a)(6) states: " ... except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

[2] *See also, United States v. A Parcel of Land, Buildings, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Runson, New Jersey*, __U.S. __, 113 S.Ct. 1126, __L.Ed.2d __ (1993) (claimant who owned house

The court in *Austin* also found it significant that Congress, in enacting the Title 21 forfeiture provisions chose to tie the forfeiture directly to the commission of drug offenses. As explained in *Austin*, these statutes focus directly on the culpability of the owner. This was further evidence of the intent of these statutes to serve the goal of punishment.

Forfeiture, as explained in *Austin*,

> is a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing law. citing *U.S. v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). *Id.* at 2812.

Since under *Halper* a penalty that cannot be correlated to the damages sustained by society or the cost of enforcing the law is considered punishment, the *Austin* opinion recognizes forfeiture as always being punishment. In fact, the court in *Austin* made this clear in its conclusion that:

> We, therefore conclude that forfeiture under these provisions constitutes payment to a sovereign as punishment for some offense, ... and as such, is subject to the limitations of the Eighth Amendment's excessive fines clause. *Id.* at 2812.

Likewise, since forfeiture under 21 U.S.C. § 881(a)(6) is a payment to a sovereign as punishment for some offense, it is subject to the Fifth Amendment's double jeopardy clause.[3]

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allegedly purchased with proceeds of illegal drug transactions was entitled to invoke and offer evidence to support innocent owner defense under 21 U.S.C. § 881(a)(6).

[3] *See also, Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, No. 93-144 (June 6, 1994) (tax on possession of illegal drugs assessed after state has imposed criminal penalty for same conduct violates double jeopardy. The tax is punitive. Court stated that even though "taxes are usually motivated by revenue raising rather than punitive purposes, there is a distinction with "fines, penalties, and forfeitures which are readily characterized as sanctions."

II. The Court of Appeals Opinion

Although the Court of Appeals had the benefit of both *Halper* and *Austin* prior to rendering its decision, it nevertheless found that the forfeiture of Petitioners' property was not punishment and that no double jeopardy bar to the criminal indictment was created.

The Court of Appeals initially rejected the conclusion of *Austin* that forfeitures are always punishment. The court concluded that the forfeiture of proceeds of drug activity under 21 U.S.C. § 881(a)(6) is not punishment for double jeopardy purposes.

Secondly, the Court of Appeals applied the *Halper* proportionality test to the forfeiture in this case concluding that the forfeiture was not excessive and thus did not constitute punishment.

a. The Court of Appeals erred in not accepting the conclusion of *Austin* that forfeitures will always constitute punishment.

In the opinion of the Court of Appeals, the reasoning of *Austin v. United States* does not apply when the property being forfeited constitutes proceeds of the illegal activity. Throughout the opinion the court fails to distinguish between proceeds and property traceable to proceeds. However, despite the court's failure to recognize this distinction, it is still clear that the reasoning of *Austin* applies to the forfeiture in this case and a double jeopardy bar is raised by the forfeiture of Appellants' property.

The key distinction between *Austin* and *Halper* is that *Austin* eliminated the need to engage in a balancing test to determine if the forfeiture of property was disproportionate to the costs to the government in prosecuting the offense. Under *Austin*, forfeitures under the drug statutes are punishment and therefore the forfeiture of property will raise a double jeopardy

bar to criminal prosecution. There is no distinction under *Austin* between proceeds of an offense and instrumentalities and the Court of Appeals erred in devising this illusory distinction.

A close reading of *Austin* will demonstrate that it answers the questions raised in this appeal in a manner directly contrary to that of the Court of Appeals' opinion. As *Austin* makes clear, forfeiture under the drug statutes is punishment. The *Austin* court stated:

> We therefore conclude that forfeiture under these provisions constitutes payment to a sovereign as punishment for some offense, *Browning-Ferris*, 492 U.S. at 265, and, as such, is subject to the limitations of the Eighth Amendment's excessive fine clause.

The court in *Austin* did not recognize a distinction between forfeiture of proceeds or property traceable to proceeds and forfeiture of instrumentalities. Forfeiture of both constitutes punishment.

Austin eliminated the question of the excessiveness of the forfeiture from the analysis as to whether a forfeiture is punishment. Forfeitures are always punishment under *Austin* and whether they are excessive is a completely separate question that has nothing to do with the double jeopardy analysis.

The Court of Appeals not only ignores this holding of *Austin* but went the completely opposite direction in finding that the forfeiture of proceeds can never be punishment. There is no support in the law for the Court of Appeals' conclusion and in fact, it is directly contradicted by *Austin*.

Moreover, there is nothing in the history or purpose of 21 U.S.C. § 881(a)(6), the proceeds forfeiture statute, which supports a conclusion that the *Austin* reasoning does not apply. First, this provision, like the specific provisions at issues in *Austin*, contains an innocent owner defense. The inclusion of the innocent owner defense in § 881(a)(6), like that contained

in § 881(a)(4) and (a)(7) evidences a congressional intent to punish only those involved in drug trafficking by forfeiting their property. As the court recognized in *Austin*, this is evidence of the punitive nature of these provisions.

Additionally, the Fifth Circuit Court of Appeals has previously considered 21 U.S.C. § 881(a)(6) and concluded that the forfeiture of proceeds under that statute could not "seriously be considered anything other than an economic penalty for drug trafficking." *See Wood v. U.S.*, 863 F.2d 417, 421 (5th Cir. 1989). The Court of Appeals in the case at bar has characterized this same statute as being "wholly remedial." The contrary opinion in *Wood* is consistent with *Austin* while the opinion in this case is contrary to *Austin*. Clearly, the Court of Appeals was correct in *Wood* when the proceeds forfeiture statute was characterized as punishment.[4]

b. The Court of Appeals erred in failing to distinguish between proceeds of illegal activity and proceeds traceable to illegal activity.

In the Court of Appeals opinion, there is no distinction drawn between proceeds of illegal activity and forfeiture of property that is merely traceable to proceeds of illegal activity. This distinction is crucial under the facts of this case.

The forfeitures in this case were based, in part, on 21 U.S.C. § 881(a)(6), which states:

> (6) All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all monies, nego-

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[4] In *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2d Cir. 1992), the court implied that the forfeiture of proceeds of a drug offense does raise a double jeopardy question. This case preceded *Austin*.

> tiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .

It is clear that under Section 6, a wide variety of factual circumstances could be present where property could be forfeited. Section 6, in fact, lists three distinct categories of forfeitable property:

1) Items furnished or intended to be furnished by any person in exchange for a controlled substance
2) Proceeds traceable to such an exchange, and
3) Items used or intended to be used to facilitate such a violation.

The variety of circumstances where forfeiture can occur under this section is obvious. For instance, money paid directly to a Defendant in exchange for illegal drugs could be forfeited under this section. On the other hand, a small amount of illegally derived money mixed with other assets and used to purchase real estate could make the entire real estate subject to forfeiture. *See, United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327 (5th Cir. 1990); *United States v. Banco Lafetero Panama*, 797 F.2d 1154 (2nd Cir. 1986); *Application of Kingsley*, 614 F.Supp. 219 (D.Mass.1985). Additionally, money, negotiable instruments and securities used or intended to be used in the drug transaction can be forfeited. The failure to distinguish between these varied circumstances undercuts the tenuous logic of the Court of Appeals' opinion.

The basic premise of the court's opinion is that forfeiture of proceeds does not take from the wrongdoer anything that he is entitled to. However, this is certainly not true of the forfeiture of property traceable to the proceeds. When property is traceable to the proceeds of illegal activity factual issues arise as to the extent that illegal funds have gone to the purchase of the property. To say that in all circumstances the wrongdoer has no

right to the property is not the same when dealing with property traceable to proceeds as it is with the proceeds themselves.

The Court of Appeals compared the forfeiture of the houses and vehicles in this case to bank robbery funds. The analogy is clearly improper. The bank robbery funds belong to somebody else. Here the houses and vehicles belong to the Petitioners. Moreover, the houses and vehicles here are not the direct fruit or proceeds of illegal activity like the bank robbery funds.

The Court of Appeals opinion has erroneously concluded that forfeitures under the proceeds statute can never be punishment. In fact, in many situations, if not all situations, this type of forfeiture is punishment. The Court of Appeals sweeping pronouncements to the contrary are directly contradicted by *Austin*.

c. Even if the *Halper* analysis applies, the Court of Appeals has improperly applied it.

While largely ignoring the ruling of *Austin*, the Court of Appeals looked back to *Halper* as establishing the test for determining if the forfeitures in this case constitute punishment. While Appellants contend that *Austin* rather than *Halper* controls in this case, the court has nevertheless misapplied *Halper*. The fatal flaw in the Court of Appeals application of *Halper* was in its method of finding that the forfeitures in this case were not so excessive as to make them punitive. In reaching this conclusion, the methodology of *Halper* itself was ignored.

The *Halper* court recognized that "a civil sanction, *in application*, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 1899. In other words, a "civil as well as criminal sanction constitutes punishment when the sanction *as applied in the individual case* serves the goals of punishment." *Id.* at 1901-1902. If the compensation extracted from a Defendant in a civil proceeding greatly surpasses the remedial justice to which

the government is entitled, then that compensation becomes clear injustice if the "supposedly remedial sanction far exceeds the government's damages and actual costs." *Id.* at 1901.

The Court of Appeals, in its *Halper* analysis, states that the "revenue from illegal drug sales and the cost to the government and society are incapable of exact measurement." However, the court's opinion went on to make broad assumptions concerning the costs to society of illegal drug sales. Based on these assumptions the court concluded that the forfeitures in this case were not so excessive as to constitute punishment for double jeopardy purposes.

This broad consideration of societal costs is inconsistent with *Halper*. Under *Halper* the question is whether the civil sanction "exceeds the government's damages and actual costs." Moreover, this broad approach to considering the societal costs of drug trafficking is inconsistent with other Circuits interpretation of *Halper*. For instance, in *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2nd Cir. 1992), the court held that where a question is raised as to whether forfeiture under the drug statutes is punitive in nature, the government may show that the forfeiture serves legitimate civil goals by presenting its cost of investigation and detection, as well as other costs and damages attributable to the criminal misconduct of the claimant.

It is clear that the focus on governmental costs is on the costs in the prosecution of the Defendant in the particular case. A generalized assessment of the costs to the government or society in fighting the distribution of illegal drugs is not the inquiry required by *Halper*.

Even if the Court of Appeals' opinion that *Halper* still controls this case rather than *Austin* is correct, the court has still erred in misapplying *Halper*. The government must prove their costs and the court cannot just presume the facts in the government's favor. The Court of Appeals has simply ignored the

evidentiary standard of *Halper* in reaching a conclusion supporting the government.

III. Contrary Authority From Other Courts

At least two opinions from state appellate courts have disagreed with the conclusion of the Court of Appeals in this case. In *Danny Fant v. State of Texas*, ___ S.W.2d ___ (Tex. App. - Houston [14th Dist.], July 21, 1994, No. A14-94-00013, 1994 W.L. 377748) the court found double jeopardy to bar the Defendant's trial for possession of a controlled substance with intent to deliver after the state had obtained a forfeiture judgment arising out of the same criminal occurrence.

Fant was arrested and charged with possession of a controlled substance with intent to deliver in Texas state court. Three days later the state initiated forfeiture proceedings against him. Fant and the state then entered into an agreed judgment whereby Appellant forfeited $3,823.00 in United States Currency and one cellular telephone. Relying upon *Halper*, *Austin* and *Kurth Ranch*, the Court of Appeals found that the forfeiture of Fant's property created a double jeopardy bar to his criminal prosecution based on the same conduct. This conclusion was based on both the United States and Texas constitutions double jeopardy clauses with the court finding that they were conceptually identical. The forfeiture was pursued under the Texas state forfeiture statute which the court in *Fant* found to be similar to the federal statute.

The *Fant* opinion is directly contrary to the Court of Appeals opinion in the case at bar. While the *Fant* court does not characterize the money and cellular telephone forfeited in that case as "proceeds" or "instrumentalities" the opinion makes clear that double jeopardy applies to forfeitures of both. Moreover, it appears that the money forfeited, which was the bulk of the forfeiture in *Fant*, was "proceeds."

In *State of Louisiana v. 1979 Cadillac Deville and $24.00 U.S. Currency Seized From Frank L. Wilson*, 632 So.2d 1221 (La.App. 2 Cir. 1994) the Louisiana Court of Appeals also issued an opinion contrary to that in the case at bar. In the Louisiana case, the officer observed Wilson driving the 1979 Cadillac above the speed limit. The officer began pursuit and then saw Wilson throw a plastic bag from the vehicle. After Wilson was stopped, the officers retrieved the plastic bag which contained cocaine. Cocaine was also found in the vehicle.

Wilson entered a guilty plea in Louisiana state court to possession of cocaine with intent to distribute. He was sentenced to one-year imprisonment. The state also filed a forfeiture petition seeking forfeiture of the vehicle. The petition alleged that the vehicle was used to facilitate the possession, transportation and concealment of cocaine. Wilson argued that the forfeiture of his vehicle would constitute double jeopardy because of his previously imposed punishment for the same conduct.

Relying on *Halper* and *Austin* the Louisiana Court of Appeals found that the forfeiture of the vehicle would constitute double jeopardy. The court stated that the forfeiture of the automobile does constitute punishment. After an extensive discussion of *Austin*, the Louisiana court concluded that forfeiture of items that are not contraband per se is punishment and the double jeopardy clause applies.

While the forfeiture in the Louisiana case was based on the vehicle being an instrumentality of the drug offense, it is clear that the reasoning employed would also apply double jeopardy under the facts of the case at bar. The Louisiana court found that forfeiture of contraband per se, i.e., items that are illegal to possess; is not punishment implicating double jeopardy considerations. However, the items forfeited in the case at bar, houses and automobiles, are not contraband per se. It is not illegal to possess them. Therefore the forfeiture of those items would

constitute punishment and raise a double jeopardy bar to the criminal prosecution in the case at bar.

The opinions from the Texas and Louisiana Court of Appeals are inconsistent with the Fifth Circuit opinion in this case. Under the opinion of either of these state courts, the facts in the case at bar raise a valid double jeopardy claim. Likewise, under the interpretation given *Austin* and *Halper* by the Fifth Circuit Court of Appeals, the facts in the Texas and Louisiana cases would not raise double jeopardy. The uncertainty left in the wake of *Austin* and *Halper* will continue to create this divergence of opinion until the Supreme Court clearly determines the scope of double jeopardy protection in regards to the forfeiture of property.

IV. Failure to hold evidentiary hearing.

In applying the *Halper* analysis, the Court of Appeals made factual findings in favor of the government that were not made by the District Court. In fact, no *Halper* factual findings were made by the District Court since no evidentiary hearing was held.

Moreover, the Court of Appeals has made factual findings that are different from that of the District Court on the question of whether the property was "proceeds" or "instrumentalities." The District Court specifically found the property to be "instrumentalities"in finding no double jeopardy bar to the prosecution. Citing *U.S. v. McCaslin*, 959 F.2d 786, 788 (9th Cir.), *cert. denied*, _____ U.S. _____, 113 S.Ct. 382 (1992), the District Court stated:

> *Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. The forfeiture of such instrumentalities is "independent of, and wholly unaffected by any criminal proceeding in personam." (District Court Memorandum Order, page 4)

On appeal, the Petitioners argued that they were entitled to an evidentiary hearing in order to determine whether the property was instrumentalities as it was characterized by the District Court. However, the Court of Appeals denied this evidentiary hearing, characterized the property as proceeds, and found their forfeiture not to constitute punishment. Thus the Court of Appeals has found the property to be "proceeds," when the District Court found them to be "instrumentalities." Whether the property is instrumentalities or proceeds and the extent to which illegal activity has tainted the property can only be resolved in an evidentiary hearing.

The conclusion of the Court of Appeals that Petitioners waived the argument that the forfeited property was anything but proceeds is not supported by the record. In fact, Petitioners requested that the Court of Appeals remand the case for a hearing at which evidence could be presented to establish whether the forfeited property was instrumentalities or proceeds.

The District Court's memorandum order denying the motion to dismiss recognized that the government's forfeiture petition alleged that the property was subject to forfeiture under both 21 U.S.C. § 881(a)(6) and (a)(7). What was the true basis for the forfeiture has never been resolved.

Based on the failure of the District Court to hold an evidentiary hearing on any of these questions, Petitioners pray that the court summarily grant this petition and remand the case with instructions that an evidentiary hearing be held. Petitioners would point out that if an evidentiary hearing demonstrated that the District Court was correct in characterizing the forfeited property as instrumentalities, much of the reasoning of the Court of Appeals opinion would be undercut. Likewise, the actual evidence presented at a *Halper* hearing may necessarily contradict the Court of Appeals weighing of the *Halper* factors in favor of the government. This request is in the alternative to the request that the court find that double jeopardy has been estab-

lished and that an order of dismissal be entered and in no way is intended to waive that argument.

CONCLUSION

The question raised in this petition is an important question of federal law that should be addressed by the Supreme Court. The Court of Appeals in this case has issued an opinion in conflict with authority from the Supreme Court. Additionally, other courts from around the country have issued decisions in conflict with the Court of Appeals decision in this case. For these reasons, Petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was forwarded to Mr. Stewart Robinson and Mr. Mike Snipes, Assistant United States Attorneys, 1100 Commerce Street, 3rd Floor, Dallas, Texas 75242, (214) 767-0951, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, on this the 8th day of August, 1994.

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U.S. v. TILLEY
Cite as 18 F.3d 295 (5th Cir. 1994)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jerry Wayne TILLEY, and Susan Wells Tilley, Tommy Ross Anderson and Sarah Jane Anderson,
Defendants-Appellees.

No. 93-1394.

United States Court of Appeals,
Fifth Circuit.

March 23, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied May 11, 1994.

Defendants charged with selling illegal drugs moved for dismissal based on prior civil forfeiture of proceeds from these drug sales. The United States District Court for the Northern District of Texas, A. Joe Fish, J., denied defendants' motion to dismiss, and defendants filed interlocutory appeal. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that civil forfeiture of proceeds from sales of drugs was not "punishment" and,thus double jeopardy clause did not bar subsequent criminal prosecution of defendants for illegal sale of drugs.

Affirmed.

1. Estoppel 68(2,4)

On appeal of trial court's refusal to dismiss drug trafficking charges, defendant's argument that personal property forfeited in civil action was proceeds of illegal drug trafficking or directly traceable thereto waived any argument that forfeited property was anything but such proceeds, even though civil complaint also sought forfeiture on grounds that property was used in trafficking. Comprehensive Drug Abuse Prevention and Control Act of 1970, §511(a)(6,7), 21 U.S.C.A. § 881 (a)(6,7).

2. Double Jeopardy 5.1

Double jeopardy clause prohibits more than one "punishment" for same offense. U.S.C.A. Const. Amend. 5.

3. Double Jeopardy 21

Regardless of order of civil and criminal proceedings predicated on same offense, double jeopardy clause will bar second sanction if both first and second sanctions are deemed punishment. U.S.C.A. Const. Amend.5.

4. Double Jeopardy 25

Civil forfeiture of proceeds from sale of drugs was not "punishment"and, thus, double jeopardy clause did not bar criminal prosecution of defendants for illegal sale of drugs; civil forfeiture served remedial purpose of reimbursing government and society for costs involved in drug trafficking, was not excessive in comparison with those costs, and did not even fully compensate government and society because forfeiture constituted only portion of proceeds which defendants' drug operation produced. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a)(6), 21 U.S.C.A. § 881 (a)(6); U.S.C.A. Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

5. Double Jeopardy 25

Possessor of proceeds from illegal drug sales has no reasonable expectation that law will protect, condone, or even allow, continued possession of such proceeds; thus, civil forfeiture of such proceeds does not constitute "punishment" for purposes of double jeopardy clause. Comprehensive Drug Abuse Prevention and Control Act of 1970, §511(a)(6), 21 U.S.C.A. §881(a)(6); U.S.C.A. Const. Amend. 5.

Gerald H. Goldstein, John Fahle, Goldstein, Goldstein & Hilley, San Antonio, TX for Jerry Tilley.

Martin L. LeNoir, Dallas, TX, for Tommy Anderson.

Barry Sorrels, Milner, Goranson, Sorrels, Udashen, Wells & Parker, Dallas, TX for Sarah Anderson.

Tim K. Banner, Robert A. Montserrat, Dallas, TX, for Susan Tilley.

Jim E. Lavine, Houston, TX, for amicus TX. Crim. Defense Lawyers Ass'n and Nat'l Ass'n of Criminal Defense Lawyers.

Micheal Snipes, Delonia A. Watson, and Stewart C. Robinson, Jr., Asst. U.S. Attys., Richard H. Stephens, U.S. Atty., Dallas, TX, for U.S.

Appeals from the United States District Court for the Northern District of Texas.

Before JOHNSON, JOLLY and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal, the defendants seek dismissal of their criminal indictment for selling illegal drugs on grounds of double jeopardy. They argue that the prior civil forfeiture of the proceeds from these drug sales constitutes punishment for the crimes charged in the indictment and that the Double Jeopardy

Clause precludes a second punishment. The district court, refusing to buy into the defendant's double jeopardy argument, denied their motion to dismiss the indictment. The defendants then filed this interlocutory appeal. Because we hold that the forfeiture of unlawful proceeds of illegal drug sales does not constitute punishment, we affirm the district court.

I

[1] In 1990, the Drug Enforcement Agency, and other authorities, began an investigation of large-scale activities involved in this case, which had yielded millions of dollars in drug proceeds. On July 25, 1991, the government filed a complaint for civil forfeiture *in rem* against certain personal and real property belonging to the defendants pursuant to 21 U.S.C. §§ 881(a)(6) and (a)(7).[1] On October 8, 1992, the government issued a criminal indictment charging the defendants for the various drug crimes committed from 1986 to 1991. On Febru-

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[1] The relevant subsections provide in part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All money, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter...

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter...

21 U.S.C. §§(a)(6) and (a)(7) (1988).

The government alleged that the personal property forfeited was either the cash proceeds of drug sales or traceable to those proceeds.

ary 5, 1993, the four defendants in this case entered into a stipulated forfeiture agreement with the United States. They agreed to forfeit significant amounts of cash, certificates of deposit, automobiles, and other personal property with a total value of approximately $650,000. Based on the stipulated agreements, the district court, on February 8, entered final judgment of forfeiture with respect to the personal property; however, the court stayed forfeiture proceedings with respect to defendants' two homes pending outcome of the criminal trial.[2] On April 7, the defendants filed a motion to dismiss the indictment on grounds that they were being subjected to multiple punishments for the same crimes in violation of the Double Jeopardy Clause. The defendants argued that they had already been "punished"for the same drug trafficking in the civil forfeiture proceeding. The district court rejected the argument and denied the motion.[3] The defendants then filed this interlocutory appeal pursuant to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

II

[2,3] The Double Jeopardy Clause prohibits more than one "punishment"for the same offense.[4] *North Carolina v. Pearce*,

[2] The final order of forfeiture did not specify whether the cash, securities, and other personal property constituted proceeds of illegal activities or personal property used in drug trafficking. The complaint sought forfeiture under 21 U.S.C. § 881(a)(6) of proceeds and property traceable to proceeds of illegal drug sales, and under § 881(a)(7) of real property used to facilitate drug trafficking. By arguing on appeal that the personal property forfeited was the proceeds of illegal drug trafficking or directly traceable thereto, the defendants have waived any argument that the forfeited property was anything but proceeds. *See In the Matter of Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1073-74 (5th Cir. 1985).

[3] The district court ruled without the benefit of the Supreme Court's subsequent decision in *Austin v. United States*, ___U.S. ___, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993).

[4] U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ").

395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The pending criminal trial in this case, if it results in a conviction, would, of course, subject the defendants to punishment. Thus, if the prior civil forfeiture proceedings, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a "punishment", the Double Jeopardy Clause will bar the pending criminal trial.[5]

The Supreme Court has classified a civil sanction for wrongful conduct as a "punishment"under the Double Jeopardy Clause when the sanction served a traditional goal of punishment, that is, deterrence or retribution, instead of the remedial goal of reimbursing the government and society for the costs that results from that wrongful conduct. *United States v. Halper*, 490 U.S. 435, 448-49, 109 S.Ct.1892, 1902, 104 L.Ed.2d 487 (1989). In *Halper*, the Supreme Court established the analytical methodology that will guide our determination of whether the civil forfeiture of the proceeds from illegal drug sales in this case served a punitive purpose, or a wholly remedial purpose. As explained below, this methodology focuses on the relationship between the amount of the civil sanction and the amount required to serve the remedial purpose of reimbursing the costs incurred by the government and society as a result of the wrongful conduct. We should make clear, however, that the sanction in *Halper* did not involve the proceeds from the crimes charged and the fact that the property forfeited in today's case constitutes unlawful proceeds is crucial to our analysis.

In *Halper*, 490 U.S. at 437-39, 109 S.Ct. at 1896-97, the government secured the conviction of a defendant on sixty-five counts of violating the False Claims Act by submitting fraudu-

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[5] Regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and second sanctions are deemed punishment. *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, ___U.S.___, 113 S.Ct. 123, 121 L.Ed.2d 78 (1992).

lent medicare claims. His crimes, however, had only netted him $585 in excess payments from the government, and the district court estimated the government's costs at $16,000. Nevertheless, the government, in a separate civil action, sought to impose an additional penalty of $130,000. Halper argued that the civil penalty constituted a second punishment on him for the same wrongful acts for which he had been criminally convicted and thus violated the Double Jeopardy Clause. *Id.* at 440, 109 S.Ct. at 1897. The Supreme Court reasoned that a government-imposed sanction, whether labelled as "criminal"or "civil", constituted punishment under the Double Jeopardy Clause if-and only if-the sanction, "*as applied in the individual case* serve[d] the goals of punishment," that is, retribution and deterrence, instead of only the traditional remedial purpose of reimbursing the government for the costs incurred because of the defendant's wrongful conduct. *Id.* at 448, 109 S.Ct. at 1899-1902 (emphases added). The Court declined to determine whether a sanction is punitive by focusing on whether a defendant subjectively feels the "sting of punishment." *Id.* at 447, 109 S.Ct. 1901 n. 7. Instead, the *Halper* Court examined the civil sanction in that case with a focus on whether it was so excessive that it was punitive. *See id.*, 490 U.S. at 447, 109 S.Ct. at 1902. The Court stated that a civil sanction constitutes criminal punishment only in the "rare case" in which the amount of the sanction is "overwhelmingly disproportionate"to the damages caused by the wrongful conduct and thus "bears no *rational relation* to the goal of compensating the government for its loss, but rather appears to qualify as 'punishment' within the plain meaning of the word." *Id.* at 449, 109 S.Ct. at 1902 (emphasis added). The Court then remanded to the district court for a determination of the government's actual costs and an application of its rational relation test. *Id.* at 452, 109 S.Ct. at 1904.

In *United States v. Ward*,488 U.S. 242, 254, 100 S.Ct. 2636, 2644, 65 L.Ed.2d 742 (1980), the Supreme Court made clear than the compensation of both the government *and society*

are remedial goals that a civil sanction may serve. The Court stated that a sanction that bore "absolutely no correlation to any damages sustained by society or the cost of enforcing the law" would be criminal. *Id.*

Thus, under *Halper,* we must classify the civil forfeiture of the unlawful proceeds of illegal drug sales under §881(a)(6) as a punishment under the Double Jeopardy Clause if, in this particular case, the amount of the proceeds forfeited was so great that it bore no rational relation to the costs incurred by the government and society resulting from the defendant's criminal conduct.

III

[4] Unlike the fine imposed in *Halper,* the forfeiture of proceeds in this particular case is not so excessive as to render the relationship between the amount of the forfeiture and the resulting costs to the government and society irrational. The forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combatting the allure of illegal drugs, caring for the victims of the criminal trade when preventative efforts prove unsuccessful, lost productivity, etc. *See One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237, 93 S.Ct. 489, 493, 34 L.Ed.2d 438 (1972) (stating that forfeiture of property under the customs laws serves remedial purpose by "provid[ing] a reasonable form of liquidated damages for violation of the inspection provisions [by] . . . reimburs[ing] the Government for investigation and enforcement expenses"); *Halper,* 490 U.S. at 444, 109 S.Ct. at 1900 (stating that costs of detection and investigation are remedial in nature); *Rex Trailer Co. v. United States,* 350 U.S 148, 153-54, 76 S.Ct. 219, 222 & n. 6, 100 L.Ed. 149 (1956)(recognizing market and societal costs resulting from wrongdoing and avoidance of unjust enrichment as remedial purposes); *Ward,* 448 U.S. at 254,

100 S.Ct. at 2644 (recognizing repayment of damages to society as remedial).

Although revenue from illegal drug sales and the cost to the government and society are incapable of exact measurement, a principle recognized in *Halper*, 490 U.S. at 449, 109 S.Ct. at 1902, the amount of illicit drug proceeds confiscated in this case do not appear to be excessive in comparison to the resulting governmental and societal costs. Various sources estimate that illegal drug sales produce approximately $80 to $100 billion per year while exacting $60 to $120 billion per year in costs to the government and society. *See, e.g.*, Martin Wolf, *Thinking About Drug Legislation,* The Financial Times (London), Sept. 4, 1989, at I-19 (estimating drug revenues in the United States to approximate $80 billion year); 134 Cong. Rec. S15,630 (statement of Sen. Danforth) (estimating drug revenues at $100 billion per year and the costs to the government and society of drugs to total at least $110 billion); *Drug Abuse Costs to U.S. May be 125 Billion Dollars-Study,* Reuter Library Report, LEXIS, MAJPAP Library, Sept. 5, 1991 (estimating economic costs of drug abuse to range from $60.4 billion to $124.9 billion); *see also Rex Trailer,* 350 U.S. at 154, 76 S.Ct. at 222 (recognizing that intangible and immeasurable costs to the government are appropriate considerations in determining whether a sanction is remedial or punitive).[6] Clearly, the above overlapping estimates of proceeds and resulting costs are not "overwhelmingly disproportionate" on a national level and, we believe, indicate a rough proportionality between the $650,000 sanction and the resulting governmental and societal costs in this case. Thus, if the drug dealers forfeited all the proceeds of their drug sales, the relation-

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[6] The overlap of the ranges of estimated proceeds of illegal drug sales and resulting governmental and societal costs indicates a rough proportionality in this case in contrast to the overwhelmingly disproportionate relationship between the $130,000 fine and the $16,585 approximation of governmental costs in *Halper,* 490 U.S. at 437-39, 109 S.Ct. at 1896-97.

ship between the amount of the proceeds and the resulting governmental and societal costs would not exhibit the excessive quality found in *Hapler* and would not be irrational for that reason.

Further, in this case, the defendants only forfeited a portion of the total proceeds that their large-scale drug operation produced over several years, i.e., the proceeds on hand at the time of seizure. The amount of the forfeiture bears a direct relation to the specific drug sales that generated those proceeds, but fails to compensate fully for the wrongs done form all the drug sales. Thus, instead of roughly approximating the resulting governmental and societal costs, the instant forfeiture failed to compensate fully for the wrongs done.

The Supreme court's recent opinion in *Austin v. United States,* ___U.S.___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), does not affect our holding today. *Austin,*-U.S. at - , 113 S.Ct. at 2803, dealt with whether forfeitures under §§ 881(a)(4)-conveyances, or means of transporting drugs such as automobiles-and (a)(7)-real estate used in drug transactions-constituted punishment under the Excessive Fines Clause. In distinguishing the civil forfeiture in *One Lot Emerald Cut Stones,*409 U.S. at 237, 93 S.Ct. at 493-a double jeopardy case in which a forfeiture was held not to constitute punishment-the *Austin Court,* ___U.S. at ___ , 113 S.Ct. at 2811-12, stated that the forfeitures of conveyances and real estate have no correlation to, or proportionality with, the costs incurred by the government and society because of the large and unpredictable variances in the values of real estate and conveyances in comparison to the harm inflicted upon government and society by the criminal act. Unlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited. As we have held, these

proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale. Thus the logic of *Austin* is inapplicable to 881(a)(6) - the forfeiture of drug proceeds.

IV

Even absent the rational relation test of the *Halper*, we would nevertheless be required to hold that the forfeiture of the proceeds from illegal drug sales does not constitute punishment because of the implicit and underlying premise of the rational relation test: The nature of the forfeiture proceeding may constitute punishment because it involves the extraction of lawfully derived property from the forfeiting party. Indeed, under the common law, "property was a right derived from society which one lost[through forfeiture] by violating society's laws." 1 William Blackstone, Commentaries on the Laws of England *299, 4 *id* at *382.

[5] When, however, the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. Unlike the $130,000 fine in *Halper*, 490 U.S. at 438, 109 S.Ct. 896, the forfeiture of approximately $650,000 of illegal proceeds does not punish the defendant because it exacts no price in liberty or lawfully derived property from him. The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. *See generally, Lucas v. South Carolina Coastal Council,*-U.S.-,-, 112 S.Ct. 2886, 2894, 120 L.Ed.2d 798 (1992); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). In short, the wrongdoer has nothing, at least nothing to which the law entitles him, to lose form the possible confiscation of the

proceeds form his criminal trade. Thus, we believe the forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property. *See Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 626, 109 S.Ct. 2646, 2652-53, 105 L.Ed.2d 528 (1989) (stating that "the government does not violate the Sixth Amendment if it seizes . . . robbery proceeds, and refuses to permit the defendant to use them to pay for his defense . . . " because "[t]he money, though in [the defendant's] possession, is not rightfully his"); *see also Rex Trailer,* 350 U.S. at 153, 76 S.Ct. at 222 n. 6 (stating that civil sanction may serve to avoid unjust enrichment). Consequently, instead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like to the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word." *Halper,* 490 U.S. at 449, 109 S.Ct. at 1902.

V

Accordingly, we AFFIRM the district court's denial of the defendant's motion to dismiss because the Double Jeopardy Clause does not bar the criminal prosecution of the defendants.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-1394

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JERRY WAYNE TILLEY,
SUSAN WELLS TILLEY,
TOMMY ROSS ANDERSON and
SARAH JANE ANDERSON,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 3-24-94; 5 Cir., ____, ____ F.3d ____)
(May 11, 1994)

Before JOHNSON, JOLLY and JONES, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOMMY ROSS ANDERSON (01),
SARAH JANE ANDERSON (02),
JERRY WAYNE TILLEY (03), and
SUSAN WELLS TILLEY (04),

Defendants.

Criminal Action No. 3:92-CR-417-G
FILED APRIL 29, 1993

MEMORANDUM ORDER

Before the court are all the motions of all defendants to dismiss the charges against them in this case for violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. For the reasons stated below, the motions are denied.

I. BACKGROUND

Defendants are accused of operating a marijuana distribution organization in the Dallas, Texas area that allegedly sold and delivered several thousand kilograms of marijuana throughout the United States from the summer of 1986 until mid-1991. The government contends that defendants earned millions of dollars as a result of these sales. The government also maintains that the defendants' real property, both business and residential, was integrally involved in the distribution operation. Specifically, it is alleged that marijuana was repackaged and weighed before shipment at one of the defendants' properties and that it was usually picked up for delivery from one of their residences.

The defendants allegedly accumulated, as a result of this operation, large amounts of wealth, evidenced by their ownership of numerous race cars and other expensive cars, luxury homes, and certificates of deposit. Although they displayed these outward signs of wealth, only small amounts of taxable income were reported to the Internal Revenue Service during the relevant years.

On July 25, 1991, the government filed a complaint for forfeiture *in rem* pursuant to 21 U.S.C. §881 (a)(6) and (a)(7). The complaint alleged that various items of real and personal property were subject to forfeiture because they were utilized in drug trafficking, were proceeds from the sale of illegal drugs, or were traceable to such proceeds The complaint also alleged that the real property was used to facilitate the storage and distribution of illegal drugs.

On February 5, 1993, the defendants entered into a stipulated judgment for forfeiture of the subject properties, in which they as claimants agreed, among other things, that the government had probable cause to seize and institute forfeiture proceedings against the defendants' properties. On February 8, 1993, Chief Judge Barefoot Sanders of this court entered a final judgment of forfeiture under which the government took possession of the proceeds from numerous certificates of deposits and checking accounts as well as numerous other articles of personal property, including automobiles, jewelry, miscellaneous electronic equipment, and other personal property.

On April 7, 1993, the defendants filed the instant motions, claiming that a criminal prosecution, after the forfeiture proceeding described above, subjects them to double jeopardy. They argue that the forfeiture suit, although civil in form, is punitive in nature because it serves the aims of deterrence and retribution and because it punishes them for the same acts as those underlying this prosecution. The defendants further contend that because 21 U.S.C. §881 (a)(6) was designed to penalize

defendants for criminal behavior, the government elected that remedy before this prosecution was initiated and is now precluded from pursuing it by the Fifth Amendment's guarantee against double jeopardy.

II. ANALYSIS

The defendants base their argument on *United States v. Halper*, 490 U.S. 435 (1989), which held that a defendant who had been convicted of medicare fraud after a criminal trail could not, consistent with the Fifth Amendment's protection against double jeopardy, also be subject to punitive civil fines under the False Claims Act unless those fines were compensatory or remedial. Contending that a punitive civil proceeding followed by a criminal prosecution can be just as violative of double jeopardy as the reverse situation in *Halper*,[1] the defendants submit that they have already been severely punished by the loss of property worth $500,000 in the related forfeiture proceeding. The government responds that *Halper* does not apply to forfeiture proceedings.

The court agrees with the government's position and with the holding of the Ninth Circuit in *United States v. McCaslin*, 959 F.2d 768, 786 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 382 (1992):

> *Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. The forfeiture of such instrumentalities is "independent of, and wholly unaffected by any criminal proceeding *in personam*."

(quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (citations omitted)). *Accord, United States v. Mendoza*, 473 F.2d 692, 694 (5th Cir. 1972) (forfeiture of convicted marijuana trafficker's automobiles not "the equivalent of criminal prosecutions for double jeopardy purposes").

It is impossible, in this court's view, to square the language of *Halper* with the defendants' contentions. *Halper* said:

> What we announce now is a rule for the *rare* case... where a fixed-penalty provision subjects a prolific but small-guage offender to a sanction overwhelmingly disproportionate to the damages he has cause.

490 U.S. at 449 (emphasis added). The defendants maintain that the government cannot prosecute them in this case because it elected to file a civil forfeiture proceeding before bringing this criminal prosecution. That argument, however, proves too much. When property is subject to forfeiture for violation of the law, illegal use of the property immediately vests title to the property in the government, irrespective of the existence of legal proceedings.[2] *See, e.g., United States v. $41,305 in Currency* 802 F.2d 1339, 1346 (11th Cir. 1986); *United States v. One Piece of Real Estate, Etc.*, 571 F. Supp. 723, 725 (W.D. Tex. 1983). "[T]he forfeiture constitutes a statutory transfer of the right [to the property] to the United States at the time the offense is committed." *United States v. Stowell*, 133 U.S. 1, 17 (1890). *Accord, Caplin & Drysdale, Chartered v. United States*, ___ U.S.___, 109 S.Ct. 2646, 2653 (1989). *See also* 21 U.S.C. § 881(h) ("[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section"). The only significance of a formal judicial decree of forfeiture is to confirm the forfeiture that has already taken place. *Stowell*, 133 U.S. at 16-17; *One Piece of Real Estate, Etc.*, 571 F. Supp. at 725.

If the defendants' position were correct, large scale drug traffickers whose property is subject to forfeiture under 21 U.S.C. § 881 could always escape criminal prosecution for violation of the drug laws by virtue of the forfeiture already effected by § 881 (h), whether or not judicial forfeiture proceedings had been commenced.[3] Given the sizable number of prose-

cutions these days of offenders whose assets are subject to forfeiture, *Halper* would — under defendants' reading — be declaring a rule not for the *rare* case but for virtually every such case. It is ironic that defendants, whose forfeited properties amounted to $500,000, maintain that they can fit within a rule intended for a "small-gauge offender" *Halper*, 490 U.S. at 449, on the theory that they have been punished enough. By their logic, the larger the offender and size of the resulting forfeiture, the more compelling the claim of double jeopardy.

III. CONCLUSION

For the reasons stated, the court concludes that the double jeopardy clause of the Fifth Amendment is inapplicable to the present case. The defendants' motions to dismiss are accordingly **DENIED**.

SO ORDERED.

April 29, 1993.

/s/
JOE FISH
United States District Judge

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[1] *See United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 123 (1992) ("the order of proceedings matters not to the analysis; the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding").

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA

Plaintiff,

v.

PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS LOCATED AT 230 CEDAR DRIVE, GRAND PRAIRIE, DALLAS COUNTY, TEXAS, ET AL,

Defendants In Rem.

CIVIL ACTION NO. 3-91CV1485-H
FILED FEBRUARY 9, 1993

STIPULATED FORFEITURE OF ALL PROPERTIES, EXCLUDING PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS AT 230 CEDAR DRIVE, GRAND PRAIRIE, DALLAS COUNTY, TEXAS

Attorneys for Plaintiff and Claimants Tommy Ross Anderson and Sarah Jane Anderson stipulate and agree as follows:

A. Claimants Tommy Ross Anderson, Sarah Jane Anderson, and David Almond stipulate and agree that the United States, its agents, officers and employees had probable cause to seize and to institute forfeiture proceedings against the defendant properties named in the Amended Complaint for Forfeiture, with the exception of the Property, All Appurtenances, and Improvements located at 230 Cedar Drive, Grand Prairie, Dallas

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[2] Defendants stipulated in the related forfeiture proceedings here that, as to the property forfeited, the government had probable cause to seize and to institute forfeiture proceedings.

County, Texas. The property at 230 Cedar Drive, Grand Prairie, Texas, will require further litigation.

B. Claimants Tommy Ross Anderson, Sarah Jane Anderson, and David Almond hereby release claim to:

1. (Property No. 2 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1110 N. Dwight Ave., Dallas, Dallas County, Texas;

2. (Property No. 3 of the Amended Complaint) Property, Ali Appurtenances, and Improvements Located at 1023 N. Dwight Ave., Dallas, Dallas County, Texas;

3. (Property No. 4 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1029 N. Dwight Ave., Dallas, Dallas County, Texas;

4. (Property No. 5 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1033 N. Dwight Ave., Dallas, Dallas County, Texas;

5. (Property No. 10 of the Amended Complaint) Proceeds in Demand Deposit Account #0247395 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

6. (Property No. 12 of the Amended Complaint) The Gold Rolex only of Assorted Jewelry valued at $26,600.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

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[3] If the defendants are correct that the existence of a previous forfeiture proceeding prevents prosecution of a criminal case under the double jeopardy clause, then two forfeiture cases decided the same term as *Halper, Caplin & Drysdale, Chartered v. United States*, ___ U.S.___, 109 S.Ct. 2646 (1989), and *United States v. Monsanto*, ___ U.S. ___, 109 S.Ct. 2657 (1989), but approximately a month later, either make no sense or were wrongly decided. Those cases upheld the deprivation before trial of assets belonging to persons accused of drug trafficking which, but for the deprivation, they would have used to pay counsel of their choice for defense of the criminal prosecution. By defendants' reasoning, no such prosecution would have been possible since the defendants had already been deprived of their property.

7. (Property No. 13 of the Amended Complaint) Three of Four Vehicles seized at 230 Cedar Drive, Grand Prairie, Texas, consisting of:

One 1966 Chevrolet Nova Super Sport, VIN 118376N121169, Valued at $5,000.00;

One 1982 Chevrolet Corvette, VIN 1G1AY8781C5109106, Valued at $13,000.00; and

Two 1991 Yamaha Waverunners III, with Trailers, ID #YAML48831091, Valued at $10,000.00;

8. (Property No. 14 of Amended Complaint) One Chaparral Trailer, Model 39, Valued at $4,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

9. (Property No. 15 of Amended Complaint) One Mitsubishi Big Screen TV, ID #R58109452, Valued at $3,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

10. (Property No. 19 of Amended Complaint) Two Vehicles in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas, consisting of:

One 1982 Chevrolet 1/2 Ton Pickup, VIN 1GCCC14H5CS182524, Valued at 1,775.00; and

One 1988 Chevrolet One Ton Pickup, VIN 1GCHR33N2JJ116300, Valued at $7,800.00;

11. (Property No. 20 of the Amended Complaint) One Kawasaki Jet-Ski Boat, with trailer, ID #RAW84441E989, Valued at $5,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas,

12. (Property No. 21 Of the Amended Complaint) One OKI Cellular Phone, Model SU-002, ID #G36-24265-1, Valued at $1,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas;

13. (Property No. 22 of the Amended Complaint) One 1985 Chevrolet Silverado Pickup, VIN 1GCEC14C4FS176800, Valued at $2,975.00, in which Tommy Anderson holds an interest, Seized from Michael D. Sutton at 1029 N. Dwight Avenue, Dallas, Texas,

of the defendant properties and agree to entry of an order forfeiting the properties listed hereinabove to the United States of America.

D. Plaintiff United States of America hereby declines to seek forfeiture of:

1. (Property No. 6 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 110 S. Smith Street, Dallas, Dallas County, Texas;

2. (Property No. 7 of the Amended Complaint) Business Assets, Accounts, and Inventory of Renegade Auto Sales Located at 2122 W. Main St., Grand Prairie, Dallas County, Texas;

3. (Property No. 8 of the Amended Complaint) Proceeds in Money Market Account #7101280 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

4. (Property No. 9 of the Amended Complaint) Proceeds in Certificate of Deposit Account #9990007884 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

5. Property No. 11 of the Amended Complaint) Proceeds in Demand Deposit Account #0262024524 to Tommy Anderson or Jane Anderson Located at Bank One, 202 Main St., Grand Prairie, Texas,

6. (Property No. 12 of the Amended Complaint) Assorted Jewelry valued at $26,600.00, Seized at 230 Cedar Drive, Grand Prairie, Texas, except for a Gold Rolex Watch;

7. (Property No. 13 of the Amended Complaint) One of Four Vehicles seized at 230 Cedar Drive, Grand Prairie, Texas, consisting of:

One 1989 Cadillac Sedan DeVille, VIN 1G6CD5152K4228718, Valued at $12,600;

8. (Property No. 16 of the Amended Complaint) Furniture consisting of Antique Oak Buffet Cabinet and Oak Secretary Desk, Valued at $1,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

9. (Property No. 17 of the Amended Complaint) $1,006.10 in United States Currency, Seized at Renagade Auto, 202 Main Street, Grand Prairie, Texas;

10. (Property No. 18 of the Amended Complaint) Miscellaneous Electronic Equipment, Seized from Renegade Auto, 202 Main Street, Grand Prairie, Texas, consisting of:

IBM PC Model 5160, ID N5581311115160/0567062, Valued at $1,000.00;

Sanyo Video Monitor; Sony Camera, ID #27102825/9000183, Valued at $3,500.00; and

Canon Copier, Model #PC-65, ID #CRP11224, Valued at $1,000.00,

of the total defendant properties and agrees to entry of an order directing the United States Marshal to release the properties listed in this paragraph hereinabove to Claimants Tommy Ross Anderson and Sarah Jane Anderson.

C. As a material inducement to the United States of America to enter into this Stipulated Forfeiture, Claimants Tommy Ross Anderson, Sarah Jane Anderson, and David Almond hereby irrevocably and unconditionally release, acquit, and forever discharge the United States of America, the United States Marshals Service, the United States Drug Enforcement Administration, and any other federal agency or local law enforcement entity, and each of its officers, employees and agents, and all persons acting by, through, under, or in concert with any of them, from any and all claims, demands, causes of action or

any costs, fees, or expenses which the said Claimants Tommy Ross Anderson, Sarah Jane Anderson, and/or David Almond may presently have, or any other claim of loss of injury, costs, fees or expenses, or for contribution or indemnification, whether presently known or unknown, arising from or in any way growing out of or resulting from or which may arise or result from the seizure, storage, possession, custody and control, and release of the above described properties by the United States Marshals Service.

The resolution and disposition by stipulation of this forfeiture *in rem* proceeding in no way is to be construed as an admission of criminal liability by any of the defendants or claimants herein.

D. The parties consent to entry of an order consistent with the terms set forth above and which further provides that each side will bear its own costs and fees.

STIPULATED AND AGREED: RICHARD H. STEPHENS
United States Attorney

/s/
ALEC B. STEVENSON, III
Assistant United States Attorney
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(214) 767-0951
ATTORNEY FOR PLAINTIFF

/s/
MARTIN LENOIR
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3102 Maple, Suite 300
Dallas, Texas 75201
(214)744-3544

ATTORNEY FOR
CLAIMANTS
TOMMY ROSS ANDERSON
SARAH JANE ANDERSON
and DAVID ALMOND

/s/ _____
TOMMY ROSS ANDERSON

/s/ _____
SARAH JANE ANDERSON

/s/ _____
DAVID ALMOND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA
Plaintiff,

v.

PROPERTY, ALL APPURTENANCES,
AND IMPROVEMENTS LOCATED AT
230 CEDAR DRIVE, GRAND PRAIRIE,
DALLAS COUNTY, TEXAS, ET AL,
Defendants
In Rem.

CIVIL ACTION NO. 3-91CV1485-H
FILED FEBRUARY 9, 1993

FINAL JUDGMENT OF FORFEITURE EXCLUDING PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS AT 230 CEDAR DRIVE, GRAND PRAIRIE, DALLAS COUNTY, TEXAS

Came before this Court the parties in the above styled case on Stipulated Forfeiture. After consideration of the stipulation this Court finds that the Plaintiff had probable cause to seize, arrest, and file forfeiture proceedings against the defendant properties described in the caption of the Amended Complaint for Forfeiture.

The Property, All Appurtenances, and Improvements Located at 230 Cedar Drive, Grand Prairie, Dallas, County, Texas, requires further litigation and is not included in this Final Judgment of Forfeiture.

This Court finds that the only valid claimants to the properties included in this Final Judgment of Forfeiture are Tommy Ross Anderson, Sarah Jane Anderson, and David Almond. All right, title, or interest in the defendant properties by any others is hereby extinguished and barred.

Therefore, it is ORDERED that:

1. Property No. 2 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1110 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 2 in Block B/8327 of ARCADIA GARDENS ANNEX, an Addition to the City of Dallas, Texas, according to the Map recorded in Volume 31, Page 211 of the Map Records of Dallas County, Texas;

2. (Property No. 3 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1023 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 2A in Block 19/8335, of the Resubdivision of Lots 1, 2, and 6, in Block 19 of Arcadia Gardens Addition, an Addition to the City of Dallas, Texas according to the Map of said resubdivision, recorded in Volume 31, Page 99, Map Records, Dallas County, Texas,

3. (Property No. 4 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1029 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 2B in Block 19/8335, of the Resubdivision of Lots 1, 2, and 6, in Block 19 of Arcadia Gardens Addition, an Addition to the City of Dallas, Texas, according to the Map of said Resubdivision, recorded

in Volume 31, Page 99, Map Records, Dallas County, Texas,

4. (Property No. 5 of the Amended Complaint) Property, All Appurtenances and Improvements Located 1033 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 1A of the Resubdivision of Lots 1, 2, and 6 in Block 19/8335 of Arcadia Gardens Addition, an addition to the City of Dallas, Texas, according to the Map of said resubdivision recorded in Volume 31, page 99 of the Map Records of Dallas County, Texas; and being the same property conveyed by deed dated 12/27/69 from C.A. Reeves, et ux, Neata D. Reeves to Ruby Faye Haskins, filed 1/5/70 in Volume 70001, page 3211, Deed Records, Dallas County, Texas,

5. (Property No. 10 of the Amended Complaint) Proceeds in Demand Deposit Account #0247395 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

6. (Property No. 12 of the Amended Complaint) The Gold Rolex only of Assorted Jewelry valued at $26,600.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

7. (Property No. 13 of the Amended Complaint) Three of Four Vehicles seized at 230 Cedar Drive, Grand Prairie, Texas, consisting of:

One 1966 Chevrolet Nova Super Sport, VIN 118376N121169, Valued at $5,000.00;

One 1982 Chevrolet Corvette, VIN 1G1AY8781C5109106, Valued at $13,000.00; and

Two 1991 Yamaha Waverunners III, with Trailers, ID #YAML48831091, Valued at $10,000.00;

8. (Property No. 14 of Amended Complaint) One Chaparral Trailer, Model 39, Valued at $4,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

9. (Property No. 15 of Amended Complaint) One Mitsubishi Big Screen TV, ID #R58109452, Valued at $3,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

10. (Property No. 19 of Amended Complaint) Two Vehicles in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas, consisting of:

One 1982 Chevrolet 1/2 Ton Pickup, VIN 1GCCC14H5CS182524, Valued at 1,775.00; and

One 1988 Chevrolet One Ton Pickup, VIN 1GCHR33N2JJ116300, Valued at $7,800.00;

11. (Property No. 20 of the Amended Complaint) One Kawasaki Jet-Ski Boat, with trailer, ID #KAW84441E989, Valued at $5,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas,

12. (Property No. 21 of the Amended Complaint) One OKI Cellular Phone, Model SU-002, ID #G36-24265-1, Valued at $1,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas;

13. Property No. 22 of the Amended Complaint) One 1985 Chevrolet Silverado Pickup, VIN

1GCEC14C4FS176800, Valued at $2,975.00, in which Tommy Anderson holds an interest, Seized from Michael D. Sutton at 1029 N. Dwight Avenue, Dallas, Texas,

of the defendant properties are hereby forfeited to the United States. The United States Marshal shall dispose of said properties according to law.

It is further ORDERED that the United States Marshal shall release:

1. (Property No. 6 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 110 S. Smith Street, Dallas, Dallas County, Texas;

2. (Property No. 7 of the Amended Complaint) Business Assets, Accounts, and Inventory of Renegade Auto Sales Located at 2122 W. Main St., Grand Prairie, Dallas County, Texas;

3. (Property No. 8 of the Amended Complaint) Proceeds in Money Market Account #7101280 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

4. (Property No. 9 of the Amended Complaint) Proceeds in Certificate of Deposit Account #9990007884 to Renegade Auto Sales, Located at Bank One. 202 Main St., Grand Prairie, Texas;

5. (Property No. 11 of the Amended Complaint) Proceeds in Demand Deposit Account #0262024524 to Tommy Anderson or Jane Anderson Located at Bank One, 202 Main St., Grand Prairie, Texas,

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Cedar Drive, Grand Prairie, Texas, except for a Gold Rolex Watch;

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One 1389 Cadillac Sedan DeVille, VIN 1G6CD5152K4228718, Valued at $12,600;

8. (Property No. 16 of the Amended Complaint) Furniture consisting of Antique Oak Buffet Cabinet and Oak Secretary Desk, Valued at $1,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

9. (Property No. 17 of the Amended Complaint) $1,006.10 in United States Currency, Seized at Renegade AUTO, 202 Main Street, Grand Prairie, Texas; and

10. (Property No. 18 of the Amended Complaint) Miscellaneous Electronic Equipment, Seized from Renegade Auto, 202 Main Street, Grand Prairie, Texas, consisting of:

IBM PC Model #5160, ID #N55813115160/0567062. Valued at $1000,00;

Sanyo Video Monitor; Sony Camera, ID #27102825/9000183, Valued at $3,500.00; and

Canon Copier, Model #PC-65, ID #CRP11224, Valued at $1,000.00,

of the defendant properties to Claimants Tommy Ross Anderson and Sarah Jane Anderson through Martin Lenoir, attorney of record for Claimants Tommy Ross Anderson and Sarah Jane Anderson, as soon as is practicable.

Each party shall bear its own costs and attorneys fees. The Clerk shall furnish a copy to each party of record. SIGNED this 9th day of February, 1993.

/s/
BAREFOOT SANDERS,
Chief Judge
United States District Court
Northern District of Texas